No. 2613

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH DISTRICT

S. T. HILLS,
as Trustee of the Estate of Max Joseph, doing business as Workingmen's Clothing Store, Bankrupt,
Petitioner,

vs.

MAX JOSEPH,
doing business as Workingmen's Clothing Store, Bankrupt,
Respondent.

No. 2613.

BRIEF OF RESPONDENT

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STATEMENT

The respondent accepts the statement in petitioner's brief as correct. As we view this

case there is but a single question presented for the consideration of the court, namely:

What is the correct construction to be given to the proviso contained in Subdivision 4, of Section 563, Rem. & Bal. Codes of Washington, as applied to the facts in this case?

ARGUMENT

The section of the statute in controversy is as follows:

"The following property shall be exempt from execution and attachment, except as hereinafter specially provided:
* * * 4. To each householder, two cows, with their calves, five swine, two stands of bees, thirty-six domestic fowls, and provisions and fuel for the comfortable maintenance of such householder and family for six months, also feed for such animals for six months; Provided, That in case such householder shall not possess or shall not desire to retain the animals above named, he may select from his property and retain other property not to exceed two hundred and fifty dollars, coin, in value. The selection in the proviso mentioned shall be made in the manner and by the person and at the time mentioned in subdivision three, and said selection shall have the same effect as selections made under subdivision three of this section."

On the threshold we desire to say, that there is no controversy over the proposition that the

Federal court in its construction of the statute is controlled by the construction of the state statute by the decision of the state court of last resort.

Our position is, however, that the Supreme court of the State of Washington, has not passed on the question presented in this record.

The petitioner relies largely on the case of Creditors' Collection Association vs. Bisbee, et al., 80 Wash., 358; 141 Pacific, 886.

We will admit that a casual reading of that case without investigating the real issue there presented might lead one to the position taken in petitioner's brief. The court, speaking of Subdivision 4, of Section 563, supra, uses the following language:

> "The words, 'other property,' appearing in the proviso of Subdivision 4 can refer only to other property of a *like nature* to that specifically mentioned under a well-known rule of statutory construction."

A careful reading of the case, however, will convince the court that Subdivision 4, was not involved. The debtor was not selecting "other property" but was selecting "money," and the Supreme court simply decided that money was

not "other property" as contemplated by the statute.

The correct analysis of that decision, as well as that of the other decision cited in petitioner's brief and a complete answer of the position taken by him, is given by the District court in Re Crook et al., 219 Fed. 979.

The court says:

"These cases were all considered in Re Swanson, supra, and the decision of the state court does not change my personal view; and being concluded upon the question of the construction of a state statute by the decision of the state court of last resort (St. Louis Southwestern Ry. Co. v. State of Arkansas, 235 U. S. 350, 35 Sup. Ct. 99, 59 L. Ed.—U. S. Supreme Court decision, filed December 7, 1914), and the issue being of such vital concern in the administration of bankruptcy estates, and the first impression being so radically opposite to what I believe the law to be, I have carefully examined the opinion and the cases upon which it is predicated, and am convinced that the only thing the court desired to say was that money cannot be selected in lieu of the animals named in the statute."

It is plain that the confusion, arising from these decisions so far as they effect the question involved in this case, arises from the failure of the court to distinguish between Subdivision 3, and Subdivision 4, of Rem. & Bal. Code.

Subdivision 3 after designating certain personal property as exempt add "and other household goods, utensils and furniture."

This plainly and expressly limits the claims to exemptions under this section to personal property of a specified kind, and its construction cannot in the least be controling in considering the lieu proviso contained in Subdivision 4.

Your attention is called particularly to the language of Subdivision 4. It does not say:

He may select etc. other *like* property or other *similar* property or *such* other property, but he may select from his property, (all of it) and retain other property not to exceed two hundred and fifty dollars, coin, in value. (The parenthesis is ours.)

Had the legislature desired to place a limitation on the selection so as to confine it to property of like nature it could have easily used language to that effect.

The legislature saw fit to limit the selection under Subdivision 3, but it did not limit the selection under Subdivision 4.

It is plain that the only limitation intended by the legislature was to limit the selection to

personal property, which does not include money.

The real issue in Creditor's Collection Association, supra., was whether money could be selected in lieu of animals; and the court held that money was not "other property" as contemplated by the statute. But it does not hold that other personal property, such as household goods, furniture and fixtures or even merchandise could not be selected under Subdivision 4.

A careful reading of that case convinces the writer that the discussion under Sudbivision 4 involved was merely incidental and that the rule of *Ejusdum Generis* was not involved.

The petitioner insists that the doctrine contended for is supported by the early case of Carter vs. Davis, 6 Wash., 327; 33 Pac. 833.

The reading of this case will plainly disclose that it is not authority for the construction of Subdivision 4 supra.

As the Hon. District Court observes in Re Crook, supra, when speaking of Carter vs. Davis, supra:

"It was sought to base the exemption right as a lieu exemption upon Subdivision 3 of Sec-

tion 563, exempting to each householder certain enumerated animals and 'other household goods, utensils, and furniture, not exceeding $500 coin in value.' This contention was denied; the court holding that no right was conferred upon the debtor to retain other property of a different character in lieu of that authorized to be retained as exempt."

The writer has no quarrel with the Supreme court in its construction of Subdivision 3 supra, because the language of the statute expressly makes its own limitation.

The laws of Washington divide exemptions into two general classes; from real property and from personal proprety and a general lieu provision restricts the selection to one or the other of these general classes; that is, real property or personal property, and in order to restrict the limitation to any particular kind of property within either of the two general classes it is necessary to make further limitation as was done in Subdivision 3 supra, but not in Subdivision 4 supra.

It is universally held the exemption statute will be liberally construed to effectuate the object for which they were designed, namely: "to prevent a householder and his family from being deprived of its immediate means of subsistence."

In this case the bankrupt did not possess any of the animals mentioned in Subdivision 4 supra. We do not contend that the merchandise selected is of like kind or character as that enumerated in Subdivision 4 supra.

The construction urged by petitioner would render the statute ridiculous.

It is very plain that if the debtor did possess the animals mentioned in Subdivision 4, then he could not select other animals of the same nature; if he did not have two cows with their calves, or five swine, he could not select two other cows with their calves, or five other swine.

The same is true of the domestic fowls and this would render the section absolutely void in about sixty per cent of the cases. In fact, in all of them excepting possibly the farmers and they might select guinea pigs, rabbits or pigeons, or possibly cannary birds, under the construction contended for by petitioner.

Counsel observes, however, that this court has no concern as to whether or not the decision of the Supreme court is well grounded. This is true but this does not mean that the court should follow the "blind leader of the blind" without determining what the Supreme court of

the State actually passed upon, or what the true issue was there presented.

We do not believe it is necessary to extend this brief further. We have examined all of the cases relied upon by petitioner and we are sanguine from a careful reading of the same that they do not support the position for which he contends.

We believe they have fallen into error by confusing the proper construction to be given to two distinct sections of the statute. The very nature of the bankrupt business was such that the selection of these goods was necessary for the maintenance of himself and his family. It provided him with at least a nucleus to start again in business and affords him the beneficent protection for which exemption laws are passed.

It is therefore respectfully submitted that the Referee and the District Judge were both correct in their order allowing the bankrupt his exemptions, and that the same should be affirmed.

Respectfully submitted,
J. Y. KENNEDY &
S. A. BOSTWICK,
Attorneys for Respondent.